82-1787
No. 82-____

Office-Supreme Court, U.S.
FILED
1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This is a dealer termination case which is in some important respects similar to *Monsanto Company* v. *Spray-Rite Service Corporation*, No. 82-914 (*cert. granted* Feb. 28, 1983), now pending before this Court. Like *Monsanto*, it presents the narrow question:

> 1. Can a *per se* unlawful vertical price-fixing conspiracy be inferred from evidence that a supplier, concerned about resale prices, received complaints from one wholesaler about the pricing activities of another wholesaler and subsequently terminated the latter wholesaler?

In addition, however, this case poses the broader and more typical question that the courts and attorneys counseling their clients on termination matters must answer:

> 2. Can such a conspiracy be inferred from the routine communications that invariably follow price complaints?

More fundamentally, this case asks the Court to consider:

> 3. Can a *per se* price fixing conspiracy be inferred from such communications and termination in the face of undisputed evidence that the termination would significantly promote interbrand competition?
>
> 4. In view of the undisputed evidence that the conduct here promoted competition, is it accurate to assume that vertical restrictions related to price are invariably anticompetitive and, hence, to condemn all such restrictions as unlawful *per se*?*

Finally, we ask the Court to consider:

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* Although not expressly posed as an issue by the petitioner in *Monsanto*, the Department of Justice has asked the Court to consider this question in its Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 15-18, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.).

5. In view of the similarities of this case and *Monsanto* and the more typical and fundamental questions raised here, would the Court have a better opportunity to resolve important questions concerning the application of the antitrust laws to vertical relationships if certiorari were granted in this case and the two cases set down for argument in tandem?

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Ninth Circuit are those listed in the caption of this Petition and Mazel Corporation and Copper State Distributors, Inc. The Buckingham Corporation is a subsidiary of Beatrice Foods Co.*

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* A list of The Buckingham Corporation's affiliates is annexed hereto as Appendix A.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The Buckingham Corporation ("Buckingham"), asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, entered in this case on February 25, 1983.

Opinions Below

The memorandum opinion of the Court of Appeals, not officially reported, is annexed hereto as Appendix B. The Court of Appeals' decision was unofficially reported at 44 Antitrust & Trade Reg. Rep. (BNA) 707 (March 31, 1983). The portions of the transcript of proceedings containing the oral opinion of the United States District Court for the District of Arizona (Hardy, J.) are annexed hereto as Appendix C. The judgment of the District Court is annexed hereto as Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15 and 26, 28 U.S.C. §§ 1331, 2201 and 2202, and the doctrine of pendent jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Statute Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

The Parties

Buckingham is the United States importer of several brands of wines and spirits, the most important of which is Cutty Sark Scotch Whisky. For many years prior to August 1981, Buckingham distributed its products in Arizona through two wholesalers, Arizona Distributing Company ("ADC") and Copper State Distributors, Inc. ("Copper State").

At the time of trial, ADC was a division of the Odom Corporation, which distributed or brokered alcoholic beverages in four states and abroad. In Arizona it sold more than a thousand brands for more than a hundred suppliers, and grossed approximately $45 million annually. In sales, it was the largest liquor wholesaler in the state.

Copper State was a much smaller wholesaler with a much smaller line of products.

The Products

Arizona distributors sell more than 95 brands of scotch, four of which, including Cutty Sark, are known as premium scotches. Each of the other premium scotches is distributed by an exclusive wholesaler. ADC's president, Jack Braddock, testified at trial that more than 99% of all wines and liquors sold in Arizona were distributed through an exclusive wholesaler.

At one time, Cutty Sark was the leading scotch in the country, but over the years its sales and image declined. During the summer of 1980, its decline was so serious that Buckingham brought in new management to try to rejuvenate the brand.

Buckingham's Choice of Copper State as its Exclusive Distributor

Buckingham's practice of selling its products through two wholesalers put Buckingham at a disadvantage in the highly competitive Arizona market where virtually all wines and liquors were sold through exclusive wholesalers. ADC's president, Braddock, acknowledged this fact in a letter to Buckingham in March 1980:

> "I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor. * * * I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we were the exclusive distributor. * * * . . . [O]ur state is not a healthy environment for dual merchandise. . . ."[1]

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1 The full text of Braddock's letter is annexed to this Petition as Appendix E.

Buckingham's new management, in its attempt to revive the floundering Cutty Sark line, began to evaluate and compare the two wholesalers in January 1981 in order to select one as exclusive distributor. In the competitive Arizona market, in which each wholesaler handles many brands, Buckingham naturally wanted a wholesaler who was willing to promote Buckingham's brands heavily and to whom these brands would be important. In the parlance of the industry, Buckingham's management was looking for "commitment" to Buckingham's products.

Several factors led to the conclusion that ADC lacked commitment to Buckingham's brands and that Copper State was more willing to promote them.

First, Copper State won a contest to become Buckingham's exclusive wine distributor in Arizona. It won because it sold far more wine than ADC during the 3-month contest period.

Second, Copper State's comparative sales performance figures were consistently higher than ADC's, apart from a brief and temporary leap in ADC's sales caused by an unprecedented 10-day discount in April 1981. Usually Copper State's prices were lower than ADC's.

Third, Buckingham learned that ADC's president had testified in December 1980 in another action that he considered Cutty Sark an unprofitable but "necessary evil" that he would get rid of when he could obtain another prestige scotch to replace it.

Finally, Copper State's chief executive, Bernard Gellerman, had persistently displayed his commitment to promoting the Buckingham brands.

On August 6, 1981, Buckingham made the only choice it could to improve its competitive position in the Arizona market—it terminated ADC.

Proceedings Below

The District Court

ADC claimed in the District Court that its termination was the result of a conspiracy between Buckingham and Copper State to fix prices. Its claim was based entirely upon a handful of innocuous communications during the 10 days in April 1981 when ADC's unprecedented discount occurred. At the most, there was a complaint by Gellerman and a few communications between Buckingham and the two distributors in an effort to resolve the confusion caused by the unprecedented price cut.

There was no evidence that Buckingham in any way suggested the actual price charged by ADC or Copper State for Buckingham's brands.[2] There was no evidence that Gellerman and Buckingham ever discussed future prices or that Buckingham made any requests concerning prices. Nor was anything said in meetings between Braddock and Buckingham personnel from which a threat of termination could be implied.

ADC also relied on a memorandum written on April 29, 1981, by Ken Ahlburg, Buckingham's Western Division Manager, to Buckingham's Senior Vice President of Sales outlining his reasons for recommending Copper State as exclusive distributor.[3] While the memorandum discusses the April discount—among other factors unrelated to pricing—nothing in it suggests coercion or a pricing agreement.

At the close of ADC's case, the District Court, concluding that "there is no evidence to show that these parties acted in concert . . .," directed a verdict dismissing ADC's price fixing claims. The court perceptively observed that if this type of evidence could support an antitrust violation, Buckingham

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2 The net wholesale price is the price listed by the wholesaler, minus a discount dependent upon the number of cases purchased. Buckingham suggested list prices for its products, but it *never* suggested discounts for Cutty Sark or its wines sold in Arizona.

3 The full text of the Ahlburg memorandum is annexed to this Petition as Appendix F.

would be "in a Catch 22 situation." If ADC could get to a jury because of Copper State's complaints about its discount, Copper State could also get to a jury if it were terminated; it could argue that, because of its consistently lower prices, which displeased Braddock, ADC was chosen as the exclusive distributor. (App. C, p. 15a) Buckingham might then be forced to choose the anticompetitive alternative of keeping both wholesalers rather than risk a treble damages judgment.

The Court of Appeals

Ignoring Buckingham's dilemma, the Court of Appeals reversed. It conceded that ADC's evidence was "weak," but held that "there was sufficient circumstantial evidence to withstand the motion for a directed verdict." (App. B, p. 9a) The Court cited two pieces of evidence which it considered sufficient to take the case to the jury: (1) the "Ahlburg Memorandum" (App. F)—even though it contained no suggestion of an agreement, and (2) Gellerman's offer at a meeting with Ahlburg to make a "commitment" in exchange for the exclusive distributorship—even though Gellerman made no mention of price.

While relying on evidence which bore absolutely no relation to price fixing, the Court of Appeals ignored the most telling piece of evidence in the case—the Braddock letter in which ADC's president admitted that it would be in Buckingham's competitive self-interest to terminate one of its wholesalers. Apparently, the Court believed that evidence of procompetitive benefits was not pertinent to determining whether there was sufficient evidence of a conspiracy to fix prices. In fact, the most logical test for inferring concerted action from a termination is whether the termination was in the individual self-interest of the supplier, acting independently, or in the collective self-interest of the alleged co-conspirators only when they coordinate their actions.[4] In this case, all the evidence demonstrated that termination of one of its wholesalers was the only procompetitive option Buckingham had.

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4 See discussion at pages 10 & 15-16 *infra*.

REASONS FOR GRANTING THE WRIT

I.

This case will assist the Court in resolving definitively the questions only partially presented in *Monsanto Company* v. *Spray-Rite Service Corporation*.

In several significant respects, the facts in this case resemble those in *Spray-Rite Service Corporation* v. *Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, No. 82-914 (Feb. 28, 1983). The Seventh Circuit there held that mere evidence of price complaints about a distributor, coupled with the distributor's subsequent termination, warranted an inference of a vertical price-fixing conspiracy between the complaining distributors and the supplier, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. 684 F.2d at 1238. The supplier, Monsanto, petitioned for a writ of certiorari which this Court granted on February 28, 1983.[5]

Monsanto poses the narrow question:

> "Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?"[6]

Although resolution of that issue is important, it will be of limited utility to lower courts and to marketers since it is rare for there to be nothing beyond a price cut, a complaint and a termination. In the large majority of cases, there will be intervening communications about that price cut, and the

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5 The writ was granted only three days after the Ninth Circuit's decision was filed herein.

6 *Monsanto* also poses an additional and separate issue: "Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?"

determinative question will concern the circumstances under which such communications may warrant an inference of conspiracy. That question, which is not presented in *Monsanto*, is squarely presented in the case at bar.

Complaints by wholesalers about other wholesalers' pricing practices are rarely ignored by suppliers. As the reported cases reveal, additional communications almost invariably ensue, both within the supplier's organization[7] and between the supplier and one or more of its wholesalers.[8] At the least, an internal report will be made. Such a report—the Ahlburg Memorandum (App. F)—was made here. Almost as often, the concerned supplier—unless chilled by antitrust decisions like the Ninth Circuit's below—will make routine inquiries, at least to determine what is happening in the marketplace. Such

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7 *See, e.g., Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,594 (4th Cir. 1983); *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 986 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982); *The Sports Center, Inc.* v. *Riddell, Inc.*, 673 F.2d 786, 789 (5th Cir. 1982); *Contractor Utility Sales Co.* v. *Certain-Teed Prods., Inc.*, 638 F.2d 1061, 1074 (7th Cir. 1981); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 938 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Girardi* v. *Gates Rubber Co. Sales Div'n, Inc.*, 325 F.2d 196, 200 (9th Cir. 1963); *A.G. Rogers Co.* v. *Merck & Co., Inc.*, 498 F. Supp. 5, 8 (E.D. Tenn. 1980); *Belk-Avery, Inc.* v. *Henry I. Siegel Co., Inc.*, 457 F. Supp. 1330, 1333-34 (M.D. Ala. 1978).

8 *See, e.g., Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,594 (4th Cir. 1983); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 948 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *Contractor Utility Sales Co.* v. *Certain-Teed Products*, 638 F.2d 1061, 1074 (7th Cir. 1981); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 939 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Westinghouse Elec. Corp.* v. *CX Processing Labs, Inc.*, 523 F.2d 668, 674 (9th Cir. 1975); *Girardi* v. *Gates Rubber Co. Sales Div'n, Inc.*, 325 F.2d 196, 201 (9th Cir. 1963); *Belk-Avery, Inc.* v. *Henry I. Siegel Co., Inc.*, 457 F. Supp. 1330, 1333 (M.D. Ala. 1978); *Schnapps Shop, Inc.* v. *H.W. Wright & Co.*, 377 F. Supp. 570, 575 (D. Md. 1973).

routine communications are "crucial to the operation of efficient distribution systems" and should be encouraged.[9]

At the risk of understatement, the law concerning the circumstances under which a vertical price-fixing conspiracy may be inferred from the communications preceding a termination is in a state of total confusion. There are not only conflicts among circuits,[10] but within circuits as well.[11]

The panel in *Monsanto*, for example, while holding that a conspiracy could be inferred from evidence that price complaints preceded a termination, did not seem to require the finding of a causal connection between the complaints and the termination. Another panel which seems to follow the *Monsanto* rationale clearly requires the showing of such a connec-

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9 Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 9 & n.12, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.) ("Amicus Brief for the United States in *Monsanto*").

10 *Compare* the Seventh Circuit panel's decision in *Monsanto*, *supra*, 684 F.2d at 1238, *and Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 991-92 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982), *with, e.g., Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856-57 (1st Cir. 1982); *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (November 19, 1982) (No. 82-848); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 844-45 (10th Cir. 1981); *and Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

11 *Compare* the Seventh Circuit panel's decision in *Monsanto*, *supra*, 684 F.2d at 1238, *with Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982); *Battle* v. *Lubrizol Corp.*, *supra*, 673 F.2d at 991-92, *with Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982); *and Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, *supra*, 637 F.2d at 111, *with Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168-170 (3d Cir. 1979).

tion.[12] Other panels, which reject the *Monsanto* rationale, take guidance from the analogy of parallel pricing cases and look to whether the termination was in the supplier's independent self-interest or only explicable as joint action.[13] The Department of Justice advocates the adoption of this test.[14] Still other panels have articulated no test and decide such cases on an *ad hoc* basis[15]—a position that has engendered a host of inconsistent decisions and provided the district courts and counseling attorneys little guidance. The decision below falls within this last group. Justice White has characterized "this disagreement in the circuits over the nature of proof required" as "especially significant." *Schwimmer* v. *Sony Corporation of America*, 103 S. Ct. 362, 363 (1982) (dissenting from denial of writs of certiorari).

Monsanto presents an opportunity to resolve some, but far from all, of the existing confusion. Because the facts in

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12 *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982).

13 *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 114 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

14 Amicus Brief for the United States in *Monsanto*, *supra*, at 8-9; Brief of the United States of America As Amicus Curiae on Rehearing En Banc, filed Oct. 1, 1982, at 5-11, *Battle* v. *Lubrizol Corp.*, No. 81-1585 (8th Cir.); Memorandum for the United States As Amicus Curiae Regarding Defendant's Motion for Summary Judgment, dated March 6, 1983, at 13-20, *O.S.C. Corp.* v. *Apple Computer, Inc.*, No. CV-81-6132-CBM (GX) (C.D. Cal.).

15 *Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,596-98 (4th Cir. 1983); *Bruce Drug, Inc.* v. *Hollister Inc.*, 688 F.2d 853, 856-57 (1st Cir. 1982); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 176 (1982); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *rehearing en banc granted* (May 21, 1982).

Monsanto show nothing more than complaints followed by termination, *Monsanto* does not provide the Court the record it needs to articulate a test that will resolve the larger question perplexing the courts below. This case provides just such a record and, in conjunction with *Monsanto*, presents an opportunity to settle the law in this important area.

Should the Court resolve nothing beyond the simple termination question raised in *Monsanto*, and defer consideration of the broader issue posed in *Buckingham*, the courts below will continue to decide termination cases on an inconsistent and largely *ad hoc* basis. Different rules will pertain in different markets—causing confusion and uncertainty, particularly in the handling of nationally distributed goods. Suppliers—sensitive to the risks of treble damage suits—will abstain from investigating conditions in the market and will make less informed decisions about how to structure distribution systems. Dialogue between suppliers and distributors—crucial to the maintenance of efficient systems of distribution—will be chilled.

In view of the great importance of resolving the broader issues posed by *Buckingham*, the Court should grant certiorari and hear *Monsanto* and *Buckingham* in tandem. Such a procedure, which the Court has often employed where different cases present similar questions,[16] would be in the interests of judicial administration. Because the legal issues the two cases present are so related, little additional burden would be placed on this Court's docket, while the burden of an important conflict in the circuits and the many resulting petitions for certiorari would be alleviated.[17]

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16 *See, e.g., NAACP* v. *Claiborne Hardware Co.*, 454 U.S. 1030 (1981); *Crawford* v. *Board of Educ. of Los Angeles*, 454 U.S. 892 (1981); *International Longshoremen's Assn.* v. *Allied Int'l, Inc.*, 454 U.S. 814 (1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 451 U.S. 906 (1981); *Diamond* v. *Diehr*, 445 U.S. 926 (1980).

17 Alternatively, the Court should hold this case for disposition following its decision in *Monsanto*. For the reasons stated above, we submit that this alternative course is much less preferable.

II.

The Ninth Circuit's decision below encourages anticompetitive behavior.

There was no dispute below that the existing distribution system for Buckingham's products in Arizona—*i.e.*, two wholesalers serving the same geographical market—was inefficient and that Buckingham's legitimate competitive interests would have been best served by terminating one of its wholesalers. Braddock, the president of ADC, admitted as much in a letter to Buckingham (App. E). Despite this evidence, the Ninth Circuit held that a *per se* unlawful vertical price-fixing conspiracy could be inferred from Buckingham's decision to terminate ADC.

In the aftermath of the *Buckingham* decision, a supplier in such circumstances faces a difficult choice: It may (1) terminate wholesaler A, (2) terminate wholesaler B, or (3) terminate neither wholesaler A nor B, thus perpetuating the inefficient status quo. Buckingham's dilemma was insoluble. Both Copper State and ADC had engaged in at least some price cutting—ADC for 10 days in April 1981 and Copper State consistently over several years. In each case, the higher priced wholesaler complained. Thus, either Copper State or ADC would have been able to argue that it was terminated as a result of its price cutting efforts and the supplier's communications with the other wholesaler.

After *Buckingham*, an attorney counseling a client that proposes to terminate a wholesaler in order to improve its competitive position must advise that terminating any wholesaler who has ever cut prices poses a substantial risk under the antitrust laws. After *Buckingham*, the option an attorney must counsel as the least risky is ironically the anticompetitive one—terminate neither distributor and preserve the inefficient status quo. In short, the *Buckingham* decision promotes anticompetitive behavior.

Viewed from the wholesalers' perspective, the *Buckingham* decision in practical effect provides wholesalers—regardless of their competitive merits—an antitrust insurance policy against termination. All an inefficient wholesaler need do to protect itself against termination is to cut prices for a brief period now and then. Some complaints will invariably be lodged with the supplier and inquiries will be made. Under *Buckingham*, nothing more is needed to reach a jury on a vertical price-fixing claim. With the threat of treble damages hanging over its head, the supplier will frequently dare not risk terminating the inefficient wholesaler.

This Court should not permit the antitrust laws to be used in this way.

III.

The Court of Appeals' decision is predicated upon basic errors of law and conflicts directly with decisions of other circuits and this Court.

The Court of Appeals' decision below rests upon two basic errors of law.

The court's first basic error was to conclude that a price fixing conspiracy could be inferred from two pieces of evidence that could not, as a matter of law, provide the basis for such an inference:

A. The Court of Appeals cited "the Ahlburg Memorandum" which said nothing about an agreement, but which the court suggested might evince "the pricing reasons for the termination." (App. B, p. 9a) Even if the court's interpretation of the Ahlburg Memorandum were correct—and the overwhelming weight of the evidence at trial indicated that Buckingham's principal reasons for terminating ADC were unrelated to price—it would have made no difference. Under this Court's decision in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), a supplier has every right to terminate a

wholesaler unilaterally for price reasons—even if those are its only reasons, which was not the case here. The issue is not the supplier's reasons, but whether an agreement existed.

B. The Court of Appeals also referred to testimony that the chief executive of Copper State offered to make a "commitment" in exchange for an exclusive distributorship. While acknowledging that this remark (taken entirely out of its context, which plainly indicated that the remark had nothing to do with prices) "might have only meant a commitment to sell the product aggressively," the Court of Appeals concluded that "a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price." (App. B, p. 10a)

The only reference to such a "commitment" in the entire record is two pages of testimony by Ahlburg in which he reports that the president of Copper State requested an exclusive distributorship (as had the president of ADC) and offered to make the following "commitment" (Trial Tr., p. 713):

> "whatever it takes to build this brand I'm here to do it. I'll work."[18]

This testimony, far from suggesting the existence of an anticompetitive conspiracy, evidenced a willingness to engage in vigorous interbrand competition—precisely the kind of conduct the antitrust laws were primarily intended to foster. *See*

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18 The court below ignored the Ahlburg testimony which immediately followed (Trial Tr., pp. 713-14):

> "Q: Did Mr. Gellerman [Copper State's chief executive] make any promises at that meeting concerning his pricing of Cutty Sark?
>
> A: No.
>
> Q: Concerning his discounting of Cutty Sark?
>
> A: No.
>
> Q: Did you ask him for any commitments concerning pricing?
>
> A: No.
>
> Q: Concerning discounting?
>
> A: No."

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law."). No reasonable jury hearing this evidence could have construed this remark as an agreement to fix prices, without resorting to guesswork or conjecture which the District Court properly did not permit. *See Galloway* v. *United States*, 319 U.S. 372, 395 (1943).

Evidence of this type should not be the basis for inferring price fixing conspiracies. It it were, almost any termination of any distributor that had ever cut prices would inaugurate an antitrust litigation and get to a jury. Coupled with the allure of treble damage awards, such a lenient standard for finding a price fixing conspiracy would invite a host of antitrust actions.

In any event, the Ninth Circuit's holding simply cannot be reconciled with this Court's decisions in *Colgate*, *Sylvania* and *Galloway*.

The court's second error was to ignore entirely the most probative piece of evidence on the conspiracy issue: the Braddock letter (App. E). The Braddock letter acknowledged—and ADC never disputed—that terminating one of the two wholesalers in the Arizona market would promote interbrand competition.

The Court of Appeals' reasons for ignoring this critical piece of evidence are not disclosed in its opinion. The court apparently believed—erroneously—that evidence of procompetitive benefits was not to be considered in a case alleging price fixing, even in determining whether a conspiracy existed in the first place.

Whatever its reasoning, the court's conclusion—that a conspiracy may be inferred notwithstanding undisputed evidence that a termination was in the supplier's competitive self-interest—squarely conflicts with decisions in the Third and Seventh Circuits. *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 114

(3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

These cases hold that, in order to prove a vertical price-fixing conspiracy from evidence of communications between a supplier and a distributor followed by a termination, it must be shown that the termination was not in the independent self-interest of the supplier. The Department of Justice has strongly urged the adoption of this test in *amicus* briefs filed in three cases, including *Monsanto*, during the last year.[19] The Braddock letter—which ADC could not dispute because its president wrote it—demonstrated conclusively that terminating ADC was in Buckingham's competitive self-interest.

This Court should grant certiorari to correct the Ninth Circuit's errors and to resolve the conflict among the circuits thus presented.

IV.

A *per se* unlawful conspiracy should not be inferred from procompetitive conduct.

As a final reason for granting certiorari, we submit that the Ninth Circuit's decision below is at odds with the very purposes of the antitrust laws.

To hold that indisputably procompetitive conduct (terminating ADC) could be the basis for infering a presumptively anticompetitive conspiracy (vertical price fixing) is a contradiction in terms. Yet that is precisely what the court below did.

This contradiction cannot be reconciled with the rationale of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court there eschewed such wooden applications of the per se rule to vertical conduct that is not plainly anticompetitive. "[D]eparture from the rule-of-reason standard," the

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19 *See* briefs cited in note 14 *supra*.

Court concluded, "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 433 U.S. at 58-59. Particularly where vertical relationships are involved, conduct should not be condemned as *per se* unlawful unless "economic and judicial experience have shown that [such conduct] invariably [has] a 'pernicious effect on competition' *and* lack[s] 'any redeeming [competitive] virtue.' "[20] In applying this rule, it must be kept in mind that "[i]nterbrand competition . . . is the primary concern of antitrust law." *Sylvania*, *supra*, 433 U.S. at 52 n.19.

There is no reason to assume that terminating a price cutting wholesaler—even where the supplier's reason for doing so is to maintain resale prices—will always have a "pernicious effect on competition" or lack "any redeming [competitive] virtue." The Braddock letter showed quite the contrary—that Buckingham was at a competitive disadvantage with two wholesalers in the Arizona market and that terminating one wholesaler would promote interbrand competition. That evidence demonstrates the error in applying the *per se* rule to Buckingham's decision to terminate ADC.

Even assuming *arguendo* that the termination was part of an agreement to maintain resale prices, we question whether the *per se* rule should apply to such vertical price restrictions, *see Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911), particularly where the effects of resale price maintenance on competition are, at most, speculative. The Department of Justice has asked this Court to consider that question in *Monsanto*.[21] In light of the undisputed procompetitive

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20 Amicus Brief for the United States in *Monsanto*, *supra*, at 16 (quoting *Sylvania*, *supra*, 433 U.S. at 49-50) (emphasis in original); *accord Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 692 (1978); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

21 Amicus Brief for the United States in *Monsanto*, *supra*, at 15-18. Senior Justice Department officials and Department economists have

benefits of the termination here, we submit that this case provides an even better record on which to reconsider the rule of *Dr. Miles*.

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recently criticized the *Dr. Miles* rule. *Attorney General William French Smith's Remarks to District of Columbia Bar*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1021, H-1, at H-2 (July 2, 1981); *Justice Drops Vertical Price Fixing, Mergers Cases Begun Within Last Year*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1022, A-7, at A-8 (July 9, 1981) (William Baxter, Assistant Attorney General, Antitrust Division); *Vertical Restraints Can Increase Consumer Welfare: Antitrust Official*, Trade Reg. Rep. (CCH) slip no. 516, at 4 (November 16, 1981) (Ronald Carr, Deputy Attorney General Antitrust Division); Schwartz & Eisenstadt, *Vertical Restraints* 31-50 (Antitrust Division Economic Policy Office Discussion Paper 1982). Similar views have been expressed by the Director of the Federal Trade Commission's Bureau of Competition and prominent commentators. *See Interview with Thomas J. Campbell, Director of Bureau of Competition*, 43 Antitrust & Trade Reg. Rep. (BNA) slip. no. 1074, 238 (July 22, 1982); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 8-14 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373 (1966).

CONCLUSION

For the foregoing reasons, we ask the Court to grant a writ of certiorari to review the decision below and to set it down for argument in tandem with *Monsanto*. In the alternative, we ask the Court to hold consideration of this petition until a decision has been rendered in *Monsanto*.[22]

Dated: April 29, 1983

Respectfully submitted,

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22 In light of the similarities between the present case and *Monsanto* and the submission of an amicus brief by the United States in *Monsanto*, the Court may find it helpful to request an amicus brief from the United States with regard to Buckingham's petition. *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 51 U.S.L.W. 3684 (U.S. Mar. 21, 1983) (No. 82-1260).

APPENDICES

Appendix A

Listing pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

The Buckingham Corporation
Affiliates*

Name of Affiliate	*Place of Incorporation*
DOMESTIC	
Allison Manufacturing Co.	Delaware
Arizona Sparkling Bottled Water, Inc.	California
Arrowhead Puritas Waters, Inc.	California
Aunt Nellie's Foods, Inc.	Wisconsin
B. L. Acquisition, Inc.	California
Beatrice Beverage Co.(1)	Delaware
Beatrice DISC, Inc.	Delaware
Beatrice Worldwide, Inc.	Delaware
Berliner & Marx, Inc.	New York
Bloomfield Industries, Inc.	Delaware
Brookside Enterprises, Inc.	California
Cal-Compack Foods, Inc.	Delaware
Certified Transportation Co., Inc.	California
County Line Cheese Company, Inc.	Delaware
Culligan DISC Company	Illinois
Culligan International Company(2)	Delaware
CWC Finance Corp.	Illinois
Dahlgren & Company	Delaware
Day-Timers, Inc.	Delaware
Edgar Packing Company, Inc.	Wisconsin
E. R. Moore Company	Delaware
Everpure, Inc.	Nevada
E. W. Kneip, Inc.	Delaware
Fiberite Corporation	Delaware
Fiberite West Coast Corporation	Delaware

* Each of the companies listed in this appendix is a subsidiary of Beatrice Foods, the parent company of The Buckingham Corporation.

Name of Affiliate	*Place of Incorporation*
Fiberite West Coast Leasing Corp.	Delaware
Fisher Nut Company	Delaware
Great Bear Spring Company	New Jersey
Harman Automotive, Inc.	Michigan
Harman Automotive—Puerto Rico, Inc.	Delaware
James J. Gallery, Inc.	Massachusetts
John Sexton & Co.	Delaware
Kelley Manufacturing Co.	Georgia
KSS Transportation Corp.	New Jersey
La Choy Food Products Company	Delaware
LouverDrape, Inc.	California
LouverDrape International, Inc.	Delaware
LouverDrape of New York	California
Mantecados Payco, Inc.	Delaware
Market Forge Co.	Delaware
Martha White Foods, Inc.	Tennessee
Melamine Plastic Corporation	Minnesota
Melnor Industries, Inc	New Jersey
Mid-America Container Corporation	Delaware
Minnesota Valley Engineering Inc.	Delaware
Mother's Cookie Company	Delaware
North East Cold Storage Corporation	Massachusetts
Pepcol Manufacturing Co.	Colorado
Peter Eckrich and Sons, Inc.	Delaware
Quincy Market Cold Storage and Warehouse Co.	Massachusetts
Rainbo Foods, Inc.	Delaware
St. John's, Inc.	Michigan
Samsonite Corporation(3)	Colorado
Samsonite Domestic International Sales Corporation	Colorado
Samsonite Inernational Sales Corp.	Colorado
Sanna, Inc.	Delaware
Stahl Chemicals S.A., Inc.	Massachusetts
Tannoy-Ortofon, Inc.	New York
Taylor Freezer Company	Delaware

Name of Affiliate	*Place of Incorporation*
The Buckingham Corporation	Delaware
The D. L. Clark Company	Delaware
Tindle Mills, Inc.	Missouri
Tropicana International, Inc.	Delaware
Tropicana Products, Inc.(4)	Florida
Waterloo Industries, Inc.	Iowa
Webcraft Games, Inc.	New Jersey
INTERNATIONAL	
Acabados Newark Stahl S.A. de C.V.	Mexico
Ailiram Productos Alimenticios S.A.	Brazil
Alimentos del Istma S.A.	Panama
Aliments Beatrice Quebec, Inc.	Canada
Anchor Japan Co., Ltd.	Japan
Artic France S.A.R.L.	France
Artic S.A.	Belgium
Artigel GmbH	West Germany
Atlantik GmbH	West Germany
B.C. Quimica Ltda.	Brazil
B.F.C. Industria e Comercio Ltda.	Brazil
B.F.C. Investments (Belgium) N.V.	Belgium
B.F. Finanziaria S.p.A	Italy
Beatrice Australia Ltd.	Australia
Beatrice Chemical Pte. Ltd.	Singapore
Beatrice Finance N.V.	Neth. Antilles
Beatrice Foods (Canada) Ltd.	Canada
Beatrice Foods Co. & Dr. Suwelack GmbH	West Germany
Beatrice Foods Co. (Middle East) Limited	Jersey, Channel Is.
Beatrice Foods (Ontario) Ltd.	Canada
Beatrice Foods (United Kingdom) Ltd.	United Kingdom
Beatrice Foods Finance (Europe) B.V.	Netherlands
Beatrice Foods Overseas Finance N.V.	Neth. Antilles
Beatrice International (Canada) Ltd.	Canada
Beatrice Foods (New Zealand) Ltd.	New Zealand

Name of Affiliate	*Place of Incorporation*
Beneke GmbH	West Germany
Beneke Industries Ltd.	Canada
Bettendorf Ltd.	Canada
Bloomfield Industries Canada Ltd.	Canada
Boquitas Fiestas, S.A. de C.V.	Honduras
Bronwater Import Kantoor Eindboven B.V	Netherlands
Cafeteria de Molsheim	France
Caramelos Royal S.A.	Venezuela
Caron B.V.	Netherlands
Chicago Specialty Mfg. of Canada Ltd.	Canada
Chitos International Y Cia Ltd.	Guatemala
Choice Confectionery Pty. Limited	Australia
Cremo Ltd.	Jamaica
Cremo Sales Ltd.	Jamaica
Culligan Italiana S.p.A.	Italy
Culligan Water Conditioning (Ontario) Limited	Canada
Dairyworld S.A	Switzerland
Daytimers of Canada Ltd.	Canada
De Forenede Isvaerker A/S	Denmark
Delite Foods Co., Ltd.	Thailand
Distribuidora Marsanita C.A.	Venezuela
Dwan Export, Ltd.	Ireland
Dwan Manufacturing, Ltd.	Ireland
Elnagh S.p.A.	Italy
Eric's Swiss Products, Inc.	Puerto Rico
Etablissements Baud S.A.	France
Euroma Ten Doesschate B.V.	Netherlands
Europe Strength Food Co. Pty. Ltd.	Australia
Eurosnax International Ltd.	Ireland
Everpure Ltd.	Ireland
Exthene Pty. Ltd.	Australia
Finance Corporation of Jamaica Ltd.	Jamaica
Food Producers Canada Ltd.	Canada
Foods and Services S.A	Switzerland
Frigor C. por A.	Dominican Republic

Name of Affiliate	*Place of Incorporation*
Gelati Sanson S.p.A.	Italy
Granos de Oriente C.A.	Venezuela
Handelsmaatschappij Winters B.V.	Netherlands
Harman International Industries GmbH	West Germany
Helados Canarios S.A.	Spain
Holanda S.A. de C.V.	Mexico
Home Pac Limited	United Kingdom
Industrias Anita C.A.	Venezuela
Industrias Benco C.A.	Venezuela
Industrias Gran Colombia S.A.	Colombia
Industrias Savoy C.A.	Venezuela
Interglas S.A.	Spain
Internacional Olivarera	Spain
Jack's Amazonia Industria de Alimentos Ltda.	Brazil
King Foods Export Ltd.	Ireland
King Foods Ltd.	Ireland
King Kandy Limited	Ireland
Koninklijke Frisdranken Industrie Winters B.V.	Netherlands
LNF Plastics (Nederland) B.V.	Netherlands
L. V. Patteson Ltd.	Canada
Lancelot Furniture Ltd.	United Kingdom
Les Fromages Crescent Ltd.	Canada
LouverDrape of Canada Limited	Canada
Manassen Lucchitti Co. Pty. Ltd.	Australia
Marlon C.A	Venezuela
Melnor GmbH	West Germany
Melnor Manufacturing Ltd.	Canada
Melnor N.V	Belgium
Metallic Lubricants Limited.	Canada
Metallic Lubricants Limited.	Taiwan
Modern Dairies Limited	Canada
Modernas Applicaciones de la Refrigeracion Industrial S.A.	Spain

Name of Affiliate	*Place of Incorporation*
Nergico-Belgique S.A.	Belgium
Nergico S.A.	France
North Shore Dairies Ltd.	Jamaica
Park City Products Ltd.	Canada
Polyvinyl Chemie (Holland) N.V	Netherlands
Pop Snax Pty. Ltd.	Australia
Pork Puffs Ltd.	Canada
Potato Distributors Ltd.	Ireland
Premier IS A/S	Denmark
Primalp S.A.	Switzerland
Productos Alimenticios Rene S.A.	Guatemala
Productos Chipy S.A.	Peru
Quan S.A. de C.V.	Mexico
Quimica Stahl Centroamericana (Nicaragua), S.A	Nicaragua
Red Tulip Chocolates Pty. Ltd.	Australia
Red Tulip Confectionery Dist. Services (S.A.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (N.S.W.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (QLD.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (VIC.) Pty. Ltd.	Australia
Red Tulip Distrib. Serv. (W.A.) Pty. Ltd.	Australia
Red Tulip Imports Pty. Ltd.	Australia
Samsonite Industrial e Commercial Ltda.	Brazil
Sandt Printing Co., Ltd.	Canada
Sedipro S.A.	France
Smith Kendon Ltd.	United Kingdom
Societe Corr. de Prod. Alimentario Socalim S.A.	France
Societe d'Exploitation des Etablissements Boizet & Barraud, S.A.	France
Societe Europeenne de Supermarches S.A.	France
Societe Pour la Rationalisation Industrielle Imperial S.A.R.L.	France
Sodeca S.A.R.L.	France

Name of Affiliate	*Place of Incorporation*
Stahl Armstrong Pty. Ltd.	Australia
Stahl Asia Trading Pte. Ltd.	Singapore
Stahl Chemical Asia Pte. Ltd.	Singapore
Stahl Chemicals (G.B.) Ltd.	United Kingdom
Stahl Chemicals Industries B.V.	Netherlands
Stahl Chemische Industrien B.V. GmbH	Austria
Stahl Iberica S.A.	Spain
Stahl Italia S.R.L	Italy
Stahl Polyvinyl Chemie GmbH	Germany
Stahl Polyvinyl International B.V.	Netherlands
Stark's Chocolate Investment Pty. Ltd.	Australia
Stark's Confectionery Limited	Australia
Sunco N.V.	Belgium
Tayto Ltd.	Ireland
Ten Doesschate B.V	Netherlands
Tendo Haco Farmacie B.V.	Netherlands
The Baron's Table Specialty Meats Pty. Ltd.	Australia
Thoro N.V.	Belgium
Tribol-Culligan GmbH, Chemotecknik	West German
Unicorp Pty. Ltd.	Australia
Van Camp Chocolate Ltd.	New Zealand
Water Conditioning Finance Limited	Canada
W.J. Dwan & Sons Ltd.	Ireland
W.J. Dwan & Sons (Athlone) Ltd.	Ireland
World Dryer Co. Ltd.	Canada
Yomix Pty. Ltd.	Australia

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-6046, 82-5241

D.C. No. CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
dba ARIZONA DISTRIBUTING COMPANY,

Defendant,

THE ODOM CORPORATION,
dba ARIZONA DISTRIBUTING COMPANY,

Counterclaimant/Appellant,

—v.—

THE BUCKINGHAM CORPORATION; MAZEL CORPORATION,
an Arizona corporation; COPPER STATE DISTRIBUTORS,
INC., an Arizona corporation,

Counterdefendants/Appellees.

MEMORANDUM

Argued and Submitted—October 15, 1982
Decided—February 25, 1983

Appeal from the United States District Court
for the District of Arizona
Honorable Charles L. Hardy, District Judge, Presiding

Before: POOLE and BOOCHEVER, *Circuit Judges*, and MCNICHOLS,* *Senior District Judge*.

Buckingham sued Odom for a declaratory judgment that its termination of Odom as a liquor distributor was lawful under the Sherman Act. The district court granted a directed verdict for Buckingham but denied it attorney's fees for defending various state law claims brought by Odom. Both sides appeal.

Although Odom's evidence was weak, there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict. Arizona law may provide for attorney's fees in cases such as this. We therefore reverse and remand.

In this case, the standard of review is critical. In considering a motion for directed verdict, the controlling inquiry is whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party (i.e., Odom). *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977). The evidence is viewed in the light most favorable to the nonmoving party. *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the "Ceccarelli" testimony, and the Finlandia discount.

Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the "Ahlburg Memorandum" which focused on the pricing reasons for the termination, and Gellerman's offer to make a "commitment" in exchange for an exclusive distrib-

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* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

utorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a directed verdict.

Odom brought a counterclaim based on the Arizona Spirituous Liquor Franchises Act, Ariz. Rev. Stat. Ann. §§ 44-1565-44-1567 (West Supp. 1982), which it later abandoned. Section 44-1567 makes an award of attorney's fees to the "prevailing party" mandatory. Thus, if Buckingham prevailed, it was error for the district court not to award attorney's fees on the Franchise Act claim. But it is not clear whether to be a "prevailing party" under Arizona law it is enough that the party prevailed on the Franchise Act claim alone, rather than in the case as a whole. The district court should initially decide this issue of Arizona law. Since it is necessary to remand for a new trial, determination of whether to make an award of attorney's fees and, if one is made, the reasonable amount, must await the outcome.

Odom also brought a counterclaim based on a theory of implied contract. Ariz. Rev. Stat. Ann. § 12-341.01(A) (West 1982) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." Buckingham was granted a directed verdict on the implied contract action.

Section 12-341.01 has a stated purpose of "mitigat[ing] the burden of the expense of litigation to establish a just claim or a just defense." Ariz. Rev. Stat. Ann. § 12-341.01(B); *Shirley v. Hartford Accident & Indemnity Co.*, 125 Ariz. 70, 607 P.2d 389, 390 (Ct. App. 1979). Therefore, in the light of the remedial nature of the statute, *Nationwide Mutual Insurance Co. v. Granillo,* 117 Ariz. 389, 573 P.2d 80, 86 (Ct. App. 1977), the court may have abused its discretion in not granting attorney's fees.

Again, it is not clear whether to be "successful" Buckingham must succeed in the case as a whole or if it is enough to succeed on the implied contract claim alone. At the conclusion of the trial, the district court should determine this issue.

Section 12-341.01(B) expressly states that reasonable attorney's fees need not equal or relate to actual attorney's fees. Therefore, if the district court awards attorney's fees on the implied contract claim, it must determine what amount would be reasonable.

REVERSED and REMANDED.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

Before: THE HONORABLE CHARLES L. HARDY
Judge of the United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jay Greenfield
Mr. Richard D. Friedman
Attorneys at Law

For the Defendant:
Mr. Daniel S. Mason
Mr. Craig Corbitt
Attorneys at Law

For Mazel Corp. and
Copper State Distributing
Mr. Daniel J. McAuliffe
Attorney at Law

November 24, 1981
Phoenix, Arizona
A. M. Session

[807]*

IN OPEN COURT (NO JURY PRESENT)

PROCEEDINGS

THE COURT: Yesterday I had my secretary call you and tell you that I was proposing to deny the motion on the counter-defendants, Buckingham and Copper State, on the antitrust claims, grant it on the implied contract claim. I really have now concluded I ought to direct a verdict on the antitrust claims.

I'd like to try to articulate my reasons. We start out with the proposition that everybody agrees here that there should only be one Cutty Sark distributor in Arizona. And the evidence seems to be undisputed when the new management took over Buckingham in late 1980 they became cognizant of the desirability of having one distributor but decided because they did not know either ADC or Copper State to wait and observe how these two companies operated.

I believe Mr. Alburg testified that even before April he was beginning to lean towards Copper State. And then in April we have the—I use the term "famous discount" by ADC, which it can be said, I think, that Mr. Gellerman complained to both Mr. Lichtenberger—well, initially to Mr. Lichtenberger then later talked to Mr. Alburg about it. While it's disputed, said, "What are you going to do about it?"

[808]

Mr. Alburg told him that he would propose to recommend that Copper State become the exclusive distributor. That was on the 28th of April. And on the 29th, after Mr. Alburg had returned to his office in Los Angeles, he talked to Mr. Karp in New York. He told him of his conversations with Mr. Braddock and Mr. Gellerman, and then wrote the memorandum, which is Exhibit 101, in which he recommended that Copper State handle the complete line on an exclusive basis.

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* Bracketed numbers refer to pages in the Reporter's Transcript of Proceedings.

I need to back up a little. On the 28th when Mr. Alburg was in Phoenix he told Mr. Braddock that Buckingham disapproved of these so-called deep discounts. And again there is a dispute in the testimony. He told him that Buckingham would like to have a voice in the programming of the sales of Cutty Sark.

There was apparently some evidence the word "program" was not used, but the discounts, or the prices, I'm not quite sure.

In any event, whatever was said, I can't find that what Mr. Alburg said to Mr. Braddock was coercive. And then, frankly, I can't find anything in the evidence from which to support a finding that Mr. Gellerman agreed that if he had the exclusive he would follow Buckingham's suggestions as to prices to be placed on the Buckingham products.

Then, what is really compelling to me, is this: If we could find an understanding between Alburg and Gellerman that [809] if he would get the exclusive distributorship then Gellerman would agree to follow Buckingham's price suggestions, if we could find that kind of an agreement—I can't see how that is an agreement of Buckingham's, because Alburg has no authority to make that agreement, the decision as to who is to be the exclusive distributor is Mr. Karp's decision, and I just don't see how he made a decision—how his decision in August was the product of any agreement on his part to give the exclusive distributorship to Gellerman, or to Copper State if Copper State would maintain its prices in accordance with Buckingham's suggestions.

Furthermore, there are a lot of cases which say that a supplier can always terminate his distributor provided that the reason, whether it's the sole reason or overriding reason or substantial reason, is not an anti-competitive one. But I suspect that in many of those cases they are cases where the suppliers are in a truly competitive market; for example, a Texaco station which for one reason or another starts undercutting, you know, selling at a lower price than all the other Texaco dealers in town, and is terminated for that reason. But here everybody agrees that there should only be one distribu-

tor. And, really, Buckingham is in a Catch 22 situation. If they give it to ADC then Copper State complains that it's done because they were lower. And, by the way, we've got the same conversations, the same—well, not the complaints, but we've [810] got the urging from Mr. Braddock in behalf of ADC to Buckingham that Arizona is just not big enough for two, it can't get proper attention.

So, as I say, Buckingham is in a no-win situation in this case, and where everybody agrees that there should only be one distributor, and Buckingham decides to give it to Copper State, how—really, how can it be an anti-competitive decision, a decision to eliminate competition? How can it be a restraint of trade?

* * *

[888]

THE COURT: I'm going to grant the motion. I have come to the conclusion there is no evidence to show these parties acted in concert, and I'm going to grant the motion.

* * *

(Whereupon the jury is returned to the courtroom.)

THE COURT: Ladies and gentlemen, I've granted a motion for directed verdict which means that I have ruled that there is nothing to go to the jury in the case. That puts you out of a job.

In this case ADC had to show that Copper State and Buckingham acted together, what the law calls acting in concert to restrain trade, but I can't find any evidence to support that kind of conclusion. On that basis I have granted a motion for directed verdict.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION, a Delaware corporation,

Plaintiff,

—VS.—

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Counterclaimant,

—VS.—

THE BUCKINGHAM CORPORATION, a Delaware corporation; MAZEL CORPORATION, an Arizona corporation; and COPPER STATE DISTRIBUTORS, INC., an Arizona corporation,

Counterdefendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly tried, and the Court having directed the verdict, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Motion for Directed Verdict of Plaintiff-Counterdefendant, The Buck-

ingham Corporation, and Counterdefendant Mazel Corporation, doing business as Copper State Distributors, Inc., is granted and that they take nothing by their counterclaim.

IT IS FURTHER ORDERED that Plaintiff-Counterdefendant have declaratory judgment against Defendant-Counterclaimant declaring that its termination of Defendant-Counterclaimant's franchise was not in violation of Arizona law.

Dated at Phoenix, Arizona this 10th day of December, 1981.

W.J. FURSTENAU, CLERK

By /S/ (Signature Illegible)
Deputy Clerk

Appendix E

(Letterhead of Arizona Distributing Company)

March 19, 1980

Mr. Robert Fine
The Buckingham Corporation
11777 San Vincente Blvd.
Suite 620
Los Angeles, CA. 90049

Dear Bob:

With the possible sale of Copperstate in the near future, it brings back to my mind our past conversation about dual items in the Arizona market. I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor.

If you would consider moving your entire line back to the Arizona Distributing Company I would personally assure you substantial increases in volume.

All the wines would be put on the "Arizona side" of the sales force and be handled by our chain division. I am confident that we could increase Mouton Cadet sales by 30 to 40 percent, the first year.

I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we were the exclusive distributor.

Bob, our state is not a healthy environment for dual merchandise and I am sure your sales figures would be impressive if you made the move to Arizona Distributing.

Many thanks for your consideration.

Sincerely

JACK

J.T. Braddock
President

jtb/les

Appendix F

MEMORANDUM

PERSONAL & CONFIDENTIAL

Date: April 29, 1981

Steve Karp
From: Ken Ahlburg

ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KEN

KA:hb